

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MARCUS AND KATHY LEAVELL)	
CORPORATION, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
vs.)	Case No. CIV-18-419-D
)	
BERKSHIRE HATHAWAY)	
HOMESTATE INSURANCE COMPANY,)	
)	
Defendant.)	

ORDER

Before the Court is Defendant’s Motion to Dismiss or, Alternatively, Motion for Judgment on Pleadings [Doc. No. 19], filed pursuant to Fed. R. Civ. P. 12(b)(6) and (c).¹ Defendant seeks dismissal of a tort claim of insurer’s bad faith asserted by Plaintiffs in this removed insurance case, on the ground that Plaintiffs’ state-court petition fails to satisfy federal pleading standards.

Plaintiffs have responded to the Motion by filing a combined Response and Unopposed Application for Leave to file Amended Complaint [Doc. No. 21]. “Instead of responding to Defendant BHHIC’s alternative Motions substantively, Plaintiffs respectfully request that they be granted leave to file an Amended Complaint to correct the

¹ Because Defendant has answered, the motion is governed by Rule 12(c). *See* Fed. R. Civ. P. 12(h)(2)(B) (defense of failure to state a claim on which relief can be granted may be raised in an answer or “by a motion under Rule 12(c)”). However, the standard for decision is the same under either rule. *See Aspenwood Inv. Co. v. Martinez*, 355 F.3d 1256, 1259 (10th Cir. 2004).

alleged deficiencies set forth by Defendant BHHIC.” *Id.* at 1-2. Plaintiffs’ filing does not comply with LCvR7.1(c), which requires a motion to be filed as a separate document. Plaintiffs do, however, comply with LCvR15.1 by submitting a proposed amended complaint with their putative motion under Fed. R. Civ. P. 15(a)(2).

Under the unique circumstances of this case, particularly in light of the unavoidable delay caused by reassignments of judges, the Court elects to excuse the technical noncompliance and to grant Plaintiffs’ unopposed request to file an amended complaint. The amendment will render Defendant’s Motion moot. *See Davis v. TXO Prod. Corp.*, 929 F.2d 1515, 1517 (10th Cir. 1991) (amended pleading “supersedes the original and renders it of no legal effect”) (internal quotation omitted); *see Predator Int’l, Inc. v. Gamo Outdoor USA, Inc.*, 793 F.3d 1177, 1180-81 (10th Cir. 2015); *Mink v. Suthers*, 482 F.3d 1244, 1254 (10th Cir. 2007).

IT IS THEREFORE ORDERED that Plaintiffs are authorized to file their proposed Amended Complaint [Doc. No. 21-1] within 7 days from the date of this Order.

IT IS FURTHER ORDERED that Defendant’s Motion to Dismiss or, Alternatively, Motion for Judgment on Pleadings [Doc. No. 19] is DENIED.

IT IS SO ORDERED this 8th day of January, 2019.



TIMOTHY D. DEGIUSTI
UNITED STATES DISTRICT JUDGE